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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TERRY LEE CARTER, Defendant and Appellant.	D071357 (Super. Ct. No. SCD268190)

APPEAL from an order of the Superior Court of San Diego County, Daniel F. Link, Judge. Affirmed as modified.

Appellate Defenders, Inc. and Anna M. Jauregui-Law, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Meagan Beale and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

The San Diego District Attorney filed an amended complaint charging Terry Lee Carter with arson of an inhabited structure (Pen. Code,[1] § 451, subd. (b); count 1); assault with a deadly weapon (§ 245, subd. (a)(1); count 2), and unlawfully causing a fire that caused an inhabited structure to burn (§ 452, subd. (b); count 3). Carter pled guilty to count 3. In exchange for Carter's guilty plea, the court granted the People's motion to dismiss counts 1 and 2.

The court granted Carter three years of formal probation. As a condition of probation, Carter was sentenced to 180 days in a licensed residential treatment program with 44 days' credit for actual time served and 44 days' credit under section 4019. Among several probation conditions, the court ordered Carter not to possess fire setting tools, to submit to warrantless searches of his computers and recordable media, and to obtain probation officer approval of his employment and residence. In addition, the court ordered Carter to pay certain fines, fees, and assessments.

Carter filed a notice of appeal and a request for probable cause to challenge the validity of his plea. The superior court denied Carter's request for a certificate of probable cause. We subsequently issued an order limiting the instant appeal to sentencing questions or other matters occurring after the plea.

Carter's appeal challenges the three probation conditions enumerated above. We agree that the condition involving possession of fire setting tools is vague; thus, we modify it. We conclude Carter forfeited his challenges to the condition requiring him to

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1 Statutory references are to Penal Code unless otherwise specified.

submit to warrantless searches of his computers and recordable media and the condition requiring him to obtain probation officer approval of his employment and residence. Finally, Carter claims and the People agree that the total of his fines, fees, and assessments is incorrect; therefore, we correct the clerical error calculating the amount owed. With these modifications, we affirm.

FACTUAL BACKGROUND[2]

Carter burned the word "pay" onto Tontee Feather's tent while he and others were inside the tent. Feather found Carter outside his tent with a lighter in his hand. Feather punched Carter in the face, and Carter grabbed a folding chair and threw it at Feather.

Carter called the police. Carter claimed Feather stole his bicycle but later agreed to pay $20 for the bicycle. Feather never paid for the bicycle. Carter also claimed that Feather owed him money for food Carter had provided him.

Feather would usually repay Carter with food stamps or methamphetamine. Carter admitted he had previously purchased marijuana and methamphetamine from Feather.

The officers arrested Carter and found methamphetamine in his pocket. The officers also found a "mini torch/lighter" in the area.

DISCUSSION

Carter challenges three conditions of his probation. One of the challenged conditions, Condition No. 14b, states that Carter is "not to possess fire setting tools." At

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2 Carter pled guilty to count 3 and the factual basis of the plea was that he "recklessly set fire to an inhabited structure." As such, we recite facts from the probation report.

the sentencing hearing, Carter objected to this condition and asked it to be stricken because he did not have a history with fires, has no fascination with fires, and did not plead guilty to arson. He also argued that he "shouldn't be prevented from having tools that we all use." The court disagreed, explaining, "it's a unique way of sending a message and or getting back to what was either a drug dealing situation or someone who was arranging, and he was using fire in a very unique way."

Neither the court nor the probation report defined the phrase "fire setting tools." Here, Carter asserts that this condition is unconstitutionally overbroad and vague. "A probation condition may be 'overbroad' if in its reach it prohibits constitutionally protected conduct." (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750.) The essential question in an overbreadth challenge "is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) A vagueness challenge is based on the "due process concept of 'fair warning.' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K*).) Therefore, a probation condition " 'must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*Ibid*.)

Carter argues "fire setting tools" is such a broad phrase that it could include items necessary for everyday use like matches, a propane gas stove, a toaster, portable heater, a

magnifying glass, a candle, or even a newspaper. He also contends that phrase is so vague he has no notice regarding what he can possess.

The People counter that Condition No. 14b must be interpreted with common sense and in context. (See *In re Ramon M.* (2009) 178 Cal.App.4th 665, 677.) They further maintain that the appropriate context here is the crime of arson, and as such, the condition should be interpreted to include the incendiary devices identified in section 453, subdivision (b)(2). That subdivision defines "incendiary device" as "a device that is constructed or designed to start an incendiary fire by remote, delayed, or instant means, but no device commercially manufactured primarily for the purpose of illumination shall be deemed to be an incendiary device for the purposes of this section." (§ 453, subd. (b)(2).) Additionally, the People contend subdivision (b)(3) offers further guidance as to the scope and meaning of the "fire setting tools" probation condition because it defines "incendiary fire" as "a fire that is deliberately ignited under circumstances in which a person knows that the fire should not be ignited." (§ 453, subd. (b)(3).) The People insist that Condition No. 14b must be construed per section 453, subdivision (b)(2) and (3), and if so construed, the condition is constitutional.

In his reply brief, Carter appears to agree with the People that the condition would pass constitutional muster by adding a specific reference to section 453. Therefore, we will modify Condition No. 14b accordingly. (See *Sheena K., supra*, 40 Cal.4th at p. 892.)

Carter next challenges Condition No. 6n, which requires him to "[s]ubmit person, vehicle, residence, property, personal effects, computers, and recordable media to search at any time with or without a warrant, and with or without reasonable cause, when

required by P.O. [probation officer] or law enforcement officer." Carter maintains this condition violates *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). However, the People contend Carter waived this claim because he failed to object in the superior court below. We agree with the People.

In *People v. Welch* (1993) 5 Cal.4th 228 at page 237 (*Welch*), the Supreme Court held that "failure to timely challenge a probation condition on '*Bushman/Lent*' grounds in the trial court waives the claim on appeal." The court's reference is to *In re Bushman* (1970) 1 Cal.3d 767 and *Lent, supra,* 15 Cal.3d 481, where the court set forth the basic rules regarding probation conditions: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Lent, supra,* at p. 486, quoting *People v. Dominquez* (1967) 256 Cal.App.2d 623, 627; see *In re Bushman, supra,* at p. 777.)

In *Welch,* the court explained why the waiver rule should apply to *Bushman/Lent* claims: "A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis." (*Welch, supra,* 5 Cal.4th at p. 235.) The court distinguished, as exempt from the waiver rule, cases involving "pure questions

of law that can be resolved without reference to the particular sentencing record developed in the trial court." (*Ibid.*)

Here, to the extent Carter argues Condition No. 6n violates *Lent*, *supra*, 15 Cal.3d 481, we find that argument forfeited. (See *Welch*, *supra*, 5 Cal.4th at p. 237.) However, Carter also argues Condition No. 6n is overbroad and vague (based on the terms "personal effects" and "recordable media"). Because he is making facial challenges to the conditions, Carter argues his claims of error raise pure questions of law that should be reviewable by this court. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.)

In *Sheena K.*, the minor was placed on probation subject to the condition that she not "associate with anyone 'disapproved of by probation.' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) On appeal, despite having not objected to the condition in juvenile court, the minor asserted that the condition was unconstitutionally vague and overbroad. (*Ibid.*) Noting that the challenge presented a pure question of law based on the face of the condition, our high court determined that the minor did not forfeit the challenge on appeal. (*Id.* at p. 889.) Addressing the claim on the merits, the court determined that absent a knowledge requirement, the condition was unconstitutionally vague. The court explained, " '[B]ecause of the breadth of the probation officer's power to virtually preclude the minor's association with anyone,' defendant must be advised in advance whom she must avoid." (*Id.* at p. 890.) The Supreme Court revised the condition to specify that the probationer need avoid only those individuals " 'known to be disapproved of' by [the] probation officer." (*Id.* at p. 892.)

Like many appellants before him, Carter cites to *Sheena K.* to avoid forfeiture. In considering this issue, we are mindful of the California Supreme Court's advice in considering whether a challenge to a probation condition has been forfeited:

> "We caution, nonetheless, that our conclusion does not apply in every case in which a probation condition is challenged on a constitutional ground. As stated by the court in *Justin S.*, [*supra*, 93 Cal.App.4th 811,] we do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' [Citation.] We also emphasize that generally, given a meaningful opportunity, the probationer should object to a perceived facial constitutional flaw at the time a probation condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction." (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.)

Carter challenges Condition No. 6n as unconstitutionally overbroad because the condition could "include a cell phone and all its expansive contents." We note that Carter does not challenge the other aspects of Condition No. 6n (a general "Fourth Waiver"), which require him to submit to searches of his home, person, vehicle, and property. We interpret Carter's silence on these conditions as his tacit approval that such conditions, albeit expansive and broad, are appropriate. Alternatively stated, Carter appears to concede there is a valid need to potentially intrude into his home or to search his person,

but for some reason, examining his cell phone, where information regarding his activities may be stored, simply goes too far.[3]

Essentially, Carter asks us to declare unconstitutional any condition by which a probation officer can search a cell phone. On the record before us, we are hesitant to do so when Carter did not raise this issue or explain to the superior court why a cell phone should be exempted from Condition No. 6n. Our reluctance to weigh in on this issue is buttressed by the fact that several cases addressing the constitutionality of electronics search probation conditions are currently pending review in our high court.[4] We are mindful that we should exhibit restraint before adding another view regarding a constitutional issue pending before the California Supreme Court. (See *California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 431, 442 ["Generally, courts should not pass on constitutional questions when a judgment can be upheld on alternative, nonconstitutional grounds. Courts should follow a policy of judicial self-restraint and avoid unnecessary determination of constitutional issues."].)

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[3] Carter relies on *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473] (*Riley*) to support his claim that a probation condition allowing the search of his cell phone implicates his privacy right. *Riley* concerned a Fourth Amendment issue and did not address the appropriate scope of a probation condition. Further, nothing in *Riley* indicates that the court viewed the privacy expectations of electronic devices as being greater than those of the home or materials that may be found in the home.

[4] (See, e.g., *In re Ricardo P.* (2015) 241 Cal.App.4th 676, 681, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, 108, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, 561, review granted March 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted April 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210.)

In addition, as part of his argument that the condition is overbroad, Carter maintains Condition No. 6n "is not justified by the purported countervailing state interests on the particular facts in this case." In other words, Carter concedes that to evaluate his overbreadth claim, we need to consider his subject crime. Such an analysis does not present a pure question of law, but instead, requires consideration of the record. Such contemplation of the record is precisely why the California Supreme Court emphasized the importance of raising constitutional challenges in the lower court to allow that court to consider the specific argument instead of asking the appellate court to address the issue in the first instance on a cold record. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 889.) Accordingly, we conclude Carter's allegedly facial challenge is akin to his claim that Condition No. 6n violates *Lent*, *supra*, 15 Cal.3d 481. We therefore determine Carter forfeited his challenge as to the overbreadth of Condition No. 6n by failing to raise this issue below.

Similarly, we are not persuaded by Carter's argument that the terms "personal effects" and "recordable media" render Condition No. 6n unconstitutionally vague. Although Carter couches his vagueness challenge under the cover that he does not have fair warning regarding what can be searched, it is clear that his primary complaint is that his cell phone is subject to search. Nevertheless, he did not raise this issue below. As such, we find this challenge forfeited as well.[5]

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[5] We observe that Carter's claim that the terms "personal effects" and "recordable media" renders Condition No. 6n unconstitutionally vague seems inconsistent with his

To avoid forfeiture, Carter maintains that his counsel was prejudicially ineffective in failing to object to Condition No. 6n. To prevail on a claim of ineffective assistance of counsel, Carter must show (1) his counsel's performance fell below the objective standard of reasonableness; and (2) he was prejudiced as a result. (*People v. Weaver* (2001) 26 Cal.4th 876, 961; *Strickland v. Washington* (1984) 466 U.S. 668, 688.) We are not persuaded. If, as here, the record on appeal sheds no light explaining why counsel acted or failed to act in the manner challenged, we must reject the claim of ineffective assistance of counsel unless there can be no satisfactory explanation for counsel's conduct. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

In this case, at least leading up to and during the sentencing hearing, Carter does not appear to have been opposed to the electronics search condition. For example, during the probation interview, the probation officer reviewed the standard probation conditions with Carter, and Carter agreed to comply.!(CT 15)! The condition to submit to warrantless searches of computers and recordable media is a preprinted condition listed on the form "Order Granting Formal Probation."!(CT 26)! At the sentencing hearing, the superior court informed Carter that he would be required to abide by all of the probation conditions listed in item six on the Order Granting Formal Probation form, which included Condition No. 6n.!(2 RT 57; CT 26)! When the court asked Carter whether he agreed to all of the terms and conditions of probation, Carter responded in the affirmative.!(2 RT 57)!

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silence as to other portions of the subject condition, including but not limited to, allowing the probation officer to search his person, vehicle, residence, and property.

Additionally, this is not a case wherein a defendant's attorney did not object to any probation condition. Here, Carter's counsel objected to the condition prohibiting Carter from possessing fire setting tools.!(2 RT 55)! Obviously, this condition troubled Carter. To the contrary, nothing in the record indicates that Carter disagreed with Condition No. 6n. Thus, we cannot definitively conclude that there was no reason to explain why Carter's counsel did not object to Condition No. 6n. In light of the record before us, Carter's claim of ineffective assistance of counsel will have to await a petition for writ of habeas corpus, should Carter believe there is a viable claim that can be pursued. (See *People v. Mendoza Tello*, *supra,* 15 Cal.4th at pp. 266-267.)

The last condition Carter challenges is Condition No. 10g, which requires the probation officer to approve Carter's residence and employment. Carter asserts Condition No. 10g violates his constitutional rights to travel, freedom of movement, liberty pertaining to travel and employment, and association. The People note that Carter did not object to the condition below; thus, they argue he has forfeited his challenge here. In response, Carter states he is making a facial challenge to the probation condition, and we need not look at the record to evaluate his claim. The People have the better argument.[6]

"If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.) The right to travel and freedom

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6 For similar reasons to what we discuss above, we reject Carter's claim his counsel was prejudicially ineffective for failing to object to Condition No. 10g.

of association are undoubtedly "constitutional entitlements." (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944 (*Bauer*).) "[W]here an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored, ' "reasonably related to the compelling state interest in reformation and rehabilitation. . . ." ' " (*Id.* at p. 942.)

Carter first argues that Condition No. 10g is overbroad because it is not narrowly tailored on the tangible harms sought to be avoided. Although the trial court did not address the residency/employment condition, we can infer it has a legitimate purpose to deter future criminality via supervision. As such, we need to consider Carter's crimes and criminal history to ascertain if Condition No. 10g is overbroad. Thus, this argument requires review of the record and forfeiture applies. (See *Sheena K., supra*, 40 Cal.4th at p. 881.)

Carter next claims Condition No. 10g is overbroad because it bestows the probation office with "unfettered discretion" to approve Carter's residency and/or employment without providing any standard to guide the approval process. We disagree. Because a probation restriction must be reasonably related to reformation and rehabilitation of the probationer (see *Bauer, supra*, 211 Cal.App.3d at p. 942), a probation officer's discretion to approve of a probationer's residence or employment must be guided by the goal of reformation and rehabilitation. (Cf. *People v. Stapleton* (2017) 9 Cal.App.5th 989, 996 [probation officer "cannot use the residence condition to arbitrarily disapprove a defendant's place of residence"].) Thus, we see nothing in

Condition No. 10g that renders it facially overbroad based on the probation officer's discretion.

Carter also asserts the residency/employment condition is vague because it does not inform him when he must obtain probation officer approval. We are not persuaded. The lack of a definite temporal component does not render this condition vague. Carter is aware that his probation officer must approve his place of residence and employment. A prudent course would be to seek approval before moving or accepting a job. The fact that the condition does not tell Carter precisely when he must obtain this approval does leave the condition constitutionally infirm. Carter knows what is required and what he must do. To the extent Carter's vagueness argument requires us to review the record below, he has forfeited this challenge as well.[7] (See *Sheena K., supra*, 40 Cal.4th at p. 881.)

Finally, Carter maintains and the People concede that the judgment contains a clerical error as to the amount of fines and fees. The amount Carter owes listed in the order granting formal probation is $1,784. Both parties agree the actual amount due is $1,374. This total is the sum of an $820 base fine, state surcharge, and penalty assessment (§ 1465.7, subd. (a)); $40 for the court operations assessment; (§ 1465.8); $154 for the criminal justice administrative fee (Gov. Code, § 29550, et. seq.); $30 for the criminal conviction assessment (Gov. Code, § 70373); $300 for general restitution

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[7] Similarly, we are not persuaded by Carter's reliance on *Bauer, supra,* 211 Cal.App.3d 937. That case does not support a facial challenge to all residency/ employment probation conditions. To the extent Carter is arguing his situation is analogous to *Bauer,* we would be required to review the record to evaluate that claim. Because he did not object to this condition below, we do not review the record as Carter has forfeited this argument.

(§ 1202.4, subd. (b)), and a 10 percent county collection fee of $30 related to the restitution fine (§ 1202.4, subd. (l)). We thus correct the order granting formal probation accordingly. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185, 187.)

DISPOSITION

Condition No. 14b is modified to read, "Defendant may not possess any incendiary device as defined in Penal Code section 453, subdivision (b)(2) and further clarified in Penal Code section 453, subdivision (b)(3)." The order is further modified to read that Carter's total amount he owes is $1,374. In all other respects, the order is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.